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In the

Supreme Court of the United States

October Term, 196[illegible]

MILK TRANSPORT, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees,

and

ALTERMAN TRANSPORT LINES, INC., and REFRIGERATED TRANSPORT CO., INC.,

Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION AND JUDGMENT BELOW

The opinion of the three-judge District Court, filed December 21, 1960, is reported in 190 F. Supp. 350. The opinion is included here as Appendix A.

The decision of the Interstate Commerce Commission, here involved, has not been printed in the official reports, but appears here as Appendix B.

GROUNDS OF JURISDICTION

This suit was brought by Appellant, Milk Transport, Inc., to set aside the Order of September 4, 1959, of the Appellee, Interstate Commerce Commission, in No. MC 113255 (Sub No. 8) and No. MC 113255 (Sub No. 9), *Milk Transport, Inc., "Grandfather Application" and Milk Transport, Inc., "Interim Application."* The action was commenced before a three-judge court in the District of Minnesota pursuant to Sec. 205(g) of the Interstate Commerce Act, 49 *U.S.C.A.*, Sec. 305(g), Sec. 10 of the Administrative Procedure Act, 5 *U.S.C.A.*, Sec. 1009, and §§ 1336, 1398, 2284 and 2321-2325, inclusive, of the Judicial Code, 28 *U.S.C.A.*, §§ 1336, 1398, 2284 and 2321-2325. Milk Transport, Inc., in addition, sought a mandatory injunction requiring the Interstate Commerce Commission to hear and determine Milk Transport's applications for a certificate to transport citrus juices, in bulk, in tank vehicles, under the provisions of §7(c) of the Transportation Act of 1958, 72 Stat. 573 (Appendix E). The Commission had, by its Order of September 4, 1959, dismissed Milk Transport's applications without a hearing.

The judgment appealed is dated December 19, 1960, and was entered December 21, 1960. The notice of appeal was filed February 17, 1961, in the United States District Court, District of Minnesota. The time for docketing this case in the Supreme Court was subsequently extended to May 18, 1961, by Order of the District Court dated April 6, 1961.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by §§ 1253 and 2101(b) of the Judicial Code, 28 *U.S.C.A.*, §§ 1253 and 2101(b).

A number of cases sustain the jurisdiction of the Supreme Court, among them, *Schaffer Transportation Company v. U. S.*, 355 U.S. 83, 78 S.Ct. 173, 2 L.Ed.2d 117; *United States, et al., v. Pierce Auto Freight Lines, Inc., et al.*, 327 U.S. 515, 66 S.Ct. at 687, 90 L.Ed. 821.

QUESTIONS PRESENTED BY APPEAL

(1) Are the "grandfather" and "interim" provisions of §7(c) of the Transportation Act of 1958 applicable only to applications for certificates to transport the 11 specified commodities in the second proviso of §7(a) of the Transportation Act of 1958, as was decided by the lower court, or, are said "grandfather" and "interim" provisions applicable to applications for certificates to transport *all* commodities "made subject to" Part II of the Interstate Commerce Act by *both* the first and second provisos of §7(a) of the Act of 1958, including citrus juices?

(2) Was the transportation of citrus juices "exempt" under §203(b)(6), Part II, Interstate Commerce Act, prior to its amendment by §7(a) of the Transportation Act of 1958?

The Interstate Commerce Commission held in the negative on question (2) and dismissed appellant's applications for that reason. The three-judge court held question (2) to be immaterial.

STATEMENT OF THE CASE

This proceeding affords the first opportunity for this Court to interpret the provisions of §7(c) of the Transportation Act of 1958 (not codified in the United States Code). In addition, the resolution of the issues presented herein involves the interpretation of §203(b)(6) of Part II of the Interstate Commerce Act (49 *U.S.C.* §303(b)(6)), both before and after its amendment by §7(a) of the Transportation Act of 1958.

On December 10, 1958, Milk Transport, Inc., the appellant, filed with the Interstate Commerce Commission two applications for a certificate to transport citrus juices, in bulk, in tank vehicles, from points in Florida and Texas to

points in Minnesota, Wisconsin, Illinois, North and South Dakota and Iowa. The applications were filed specifically for determination and handling under the "grandfather" and "interim" clauses of §7(c) of the Transportation Act of 1958, and were filed within the 120-day period prescribed by the Act of 1958.[1]

The "grandfather" provision of §7(c) reads as follows:

> "* * * if any person * * * was in bona fide operation on May 1, 1958, * * * in the transportation of property for compensation by motor vehicle made subject to the provisions of Part II of that Act by paragraph (a) of this section * * * the Interstate Commerce Commission shall without further proceedings issue a certificate or permit * * *."

The phrase "Part II of that Act" refers to Part II of the Interstate Commerce Act, (49 *U.S.C.A.*, §§ 301-328). The phrase, "paragraph (a) of this section" refers to §7(a) of the Transportation Act of 1958, which amended §203(b)(6) of Part II of the Interstate Commerce Act, the agricultural commodity exemption clause of the Federal Motor Carrier Act.

Sec. 203(b)(6) of Part II exempts carriers engaged in the transportation of non-manufactured agricultural commodities from the necessity of obtaining Certificates of Public Convenience and Necessity authorizing such transportation pursuant to §206 of Part II of the Interstate Commerce Act. Sec. 7(a) of the Act of 1958 extensively amended §203(b)(6), (see Appendix D) and as a result of §7(a), many commodities which were formerly "exempt" under §203(b)(6), as interpreted by this Court, became suddenly "not exempt," meaning that a certificate had to be obtained in order

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[1]There is a distinction between the "interim" and "grandfather" clauses of §7(c), but this difference is not material at this point. To simplify the presentation of the issues, it will be necessary only to discuss the "grandfather" provision of §7(c).

that a carrier might continue transporting these commodities. Congress provided a "grandfather" clause in §7(c) of the Act of 1958 in order that existing carriers, caught in the change of law, would be automatically certificated without the necessity of applying under §206 for a certificate of Public Convenience and Necessity. The existing carriers were required only to file their "grandfather" applications within 120 days after the effective date of the Act of 1958, or by December 12, 1958.[2]

The three-judge court stated at 190 F.Supp. at 352:

> "All parties agree that a basic requirement of the right to continue hauling a particular commodity under the 'grandfather' clause is that the commodity must have been 'exempt' prior to the 1958 Act and was made 'non-exempt' by the Act."

To state it in another fashion, the phrase in §7(c):

> "made subject to * * * Part II of that Act by paragraph (a) of this section,"

should be read:

> "changed from 'exempt' to 'not exempt' by §7(a) of the Act of 1958."

It was, and is, the contention of appellant, Milk Transport, that, under the law as interpreted by this Court prior to the Act of 1958, citrus juices were an agricultural commodity and not a manufactured product thereof within the meaning of former §203(b)(6) of Part II of the Interstate Commerce Act, or were, in other words, "exempt" from the certificate requirements of §206 of Part II of the Interstate Commerce Act. This contention is based primarily upon *East Texas Motor Freight Lines v. Frozen Foods Express*, 1956, 351 U.S. 49, 76 S.Ct. 574, 100 L.Ed. 917.

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[2]In all respects the procedural requirements were complied with by Milk Transport, Inc.

It is conceded, of course, that citrus juices are now "not exempt," by virtue of the first proviso of §7(a) of the Act of 1958. The first proviso incorporated, by reference, Ruling 107, March 19, 1958, Bureau of Motor carriers, Interstate Commerce Commission, and declared that all commodities in Ruling 107 listed as "not exempt" therein, shall be "not exempt" and similarly commodities listed as "exempt" in Ruling 107 shall be "exempt." Citrus juices are now "not exempt" by statute because they are listed as "not exempt" on page 6 of Ruling 107.

Therefore, appellant contended, and contends now, that citrus juices being "exempt" prior to the Act of 1958 and "not exempt" after the Act of 1958, the legal prerequisites are present for the applicability of the "grandfather" clause of §7(c), and the Commission was therefore required to accept the applications for determination and handling under §7(c).

The Commission, by order of September 4, 1959, dismissed plaintiff's applications without a hearing. See Appendix B. Milk Transport's Petition for Reconsideration was denied by the Commission on December 22, 1959. Appendix C.

The Commission's Order is succinct. The Commission determined simply that citrus juices were not "exempt" prior to the Act of 1958 under former §203(b)(6), and that there had not been, therefore, the requisite change of status from "exempt" to "not exempt" for the "grandfather" clause of §7(c) to apply.

At this point, then, the only issue was whether the Commission's decision was correct for the reason given.

The plaintiff, on April 8, 1960, commenced proceedings before the three-judge Court in the District of Minnesota for review of the Commission's Order of September 4, 1959.

The United States and the Interstate Commerce Commission did not defend the Order of the Commission upon the grounds invoked in the Order. The claim was made that the

issue of the "exempt" status of citrus juice prior to the Act of 1958 was immaterial.

Instead, the appellees contended, and the lower Court agreed, that, even though citrus juices may have been "exempt" prior to the Act of 1958, Milk Transport was, nevertheless, not entitled to secure a certificate under the lenient "grandfather" clause of §7(c).

The appellees and the lower court reasoned that the lenient provisions of the "grandfather" clause of §7(c) were applicable only to the 11 specified commodities in the *second* proviso of §7(a) of the Act of 1958[3], and since citrus juices were not one of those commodities, it made no difference that citrus juices may have been "made subject to" Part II of the Interstate Commerce Act by the *first* proviso of §7(a) of the Act of 1958.

The reason assigned by the Commission for dismissing appellant's applications and the reason given by the three-judge Court for sustaining the Order of the Commission are quite different. The failure of the appellees to defend the reason given by the Commission is a tacit admission of error by the Commission.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

The first question deals with the correctness of the decision of the three-judge Court that the "grandfather" rights of §7(c) are applicable only to the 11 commodities listed in the second proviso of §7(a). This is the first case in which this question has been presented to this Court. The question is a matter which has major significance in the administration of the Interstate Commerce Act.

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[3]"Frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted)."

The holding of the three-judge Court is submitted to be erroneous for the following reasons:

(1) The "grandfather" rights secured in §7(c) are expressly applicable to property "made subject to the provisions of Part II of that Act *by paragraph (a) of this section* [§7(a)]." (Emphasis added.) The lower Court did *not* decide that only the 11 specified commodities were "made subject to" Part II, but determined that *regardless* of what other commodities may have been "made subject to" Part II by §7(a), only carriers of the 11 specified commodities would be afforded "grandfather" rights. These 11 commodities are listed in the *second proviso* of §7(a). Citrus juices were "made subject to" Part II by the *first proviso*, §7(a), through the statutory incorporation of Ruling 107. Sec. 7(c) makes no distinction between the first and second provisos of §7(a) but simply states "paragraph (a)," which means, obviously, the whole of §7(a). A carrier of any commodity whose status was changed from "exempt" to "not exempt" by either the first or second provisos of §7(a) is entitled to "grandfather" rights under §7(c).

(2) The express language of §7(c) denies any restrictive interpretation limiting its effect to only the second proviso commodities of §7(a). Therefore, the lower court's inquiry into the legislative history is unwarranted. §7(c) is unambiguous.

(3) Even so, the legislative history, read as a whole, indicates only that Congress intended in §7(a) to make specific, by statute, the status of hundreds of commodities in order to prevent the administration of Part II of the Interstate Commerce Act from becoming convulsed in interminable litigation.[4] To be sure, the 11 commodities listed in the second proviso of §7(a) were accorded

"grandfather" rights, but the Committee reports do not state or even imply, that *only* carriers of these 11 commodities were to be so favored. The decision of the lower court means that coffee bean carriers, for instance, survived unaffected by the imposition of the full weight of regulation, while formerly exempted citrus juice carriers were threatened with extinction with the change of law by the long interruption in operations until they could obtain a certificate of public convenience and necessity under §206 of Part II. Carriers with "grandfather" rights were allowed to continue operations during the pendency of their "grandfather" applications by the terms of §7(c) of the Act of 1958. Such an intention to discriminate, without a reasonable basis, between carriers of coffee beans and citrus juices, cannot be attributed to Congress.

(4) The lower court has judicially amended §7(c) to read:

> "made subject to * * * Part II * * * by *the second proviso* of paragraph (a) of this section."

If Congress intended that only existing carriers of the 11 commodities listed in the second proviso of §7(a) were to have "grandfather" rights under §7(c), Congress could easily have said so by the addition of only a few words, but it did not.

(5) The fact that the Commission refused to dismiss the application for the reasons stated by the Court, constitutes the strongest possible administrative interpretation of §7(c), which is contrary to the interpretation given by the three-judge court.

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[4]Due, in large part, to the Commission's reluctance to accept this Court's decision in *East Texas Motor Freight Line v. Frozen Foods Express*, supra. The Commission has officially expressed its extreme distaste for the *East Texas* case. See *Determination of Exempted Agricultural Commodities (coffee and cucumbers)*, 74 M.C.C. 549.

(6) The Commission has itself interpreted §7(c) in a manner contrary to the lower court's interpretation. *Inland Motor Freight Grandfather Application* (Oct. 7, 1960), 14 Fed. Carr. Cas., par. 35,004 (CCH reports); see *ICC Practitioner's Journal*, February, 1961, page 602. The Commission stated therein that §7(c) was intended "to secure to existing carriers their right to operating authority coextensive with their prior lawful operations."

II.

If question (1) is determined favorably to the appellant, Milk Transport, there nevertheless remains the question of whether the status of citrus juices was changed from "exempt" to "non-exempt" by §7(a) of the Act of 1958. This question, in turn, narrows to the issue of whether citrus juices were "exempt" prior to the Act of 1958, (since they are concededly "not exempt" since the Act of 1958). The question must be decided in the light of former §203(b)(6), as interpreted by this Court prior to the Act of 1958.

Former §203(b)(6) provided simply, in pertinent part:

"§203.

"(b) Nothing in this part, except the provisions of §204 relative to qualifications in maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * *

"(6) Motor vehicles used in carrying property consisting of * * * agricultural (including horticultural) commodities (not including manufactured products thereof) * * *."

We submit it is self-evident that citrus juices are a basic agricultural commodity and are not a manufactured product. The controlling interpretation of former §203(b)(6) is *East Texas Motor Freight Line v. Frozen Foods Express*, 351 U.S. 49, 76 S.Ct. 574, 100 L.Ed. 917, wherein the principle was announced:

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing state, we cannot say that it has been "manufactured" within the meaning of §203(b)(6)."

It is obvious that citrus juices not only maintain their substantial identity during extraction process, but remain precisely identical with the juice as it is first created by nature within the host fruit. Extraction amounts to no more than merely removing the juice from its natural environment.

By consent of the parties there was submitted to the three-judge court a partial transcript in a proceeding before the Commission entitled *Milk Transport, Inc.—Extension—Citrus Juices, Frostproof, Fla.*, MC 113255 (Sub 15). This transcript is contained in Appendix III of Milk Transport's brief to the three-judge Court dated July 1, 1960. This testimony establishes that juices (in this case, orange juice) are extracted by machine, flash-pasteurized and pre-cooled, prior to transporting in truck-trailers. Nothing more occurs. In another proceeding, *Milk Transport, Inc.—Extension—Bulk Commodities*, MC 113255 (Sub No. 3), reported in 78 M.C.C. 335, the process is described by the Commission as follows:

> "The juice is prepared for shipment at Frostproof (Fla.) by a flash-heating process to pasteurize it and inhibit the growth of bacteria, after which it is chilled and shipped in insulated, stainless steel tank vehicles."

This slight processing is, perhaps, less intense than the very similar treatment given milk, yet milk has consistently been held to be a non-manufactured agricultural commodity by the Commission. *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, 551.

In *East Texas Motor Freight Line v. Frozen Foods Express*, supra, the Court discussed the considerable processing which takes place when a chicken is killed and dressed for market; the Court stated:

> "But it is no more drastic a change than a change which takes place in milk from pasteurizing, homogenizing, adding vitamin concentrates, standardizing, and bottling. Yet the Commission agrees that milk so processed is not a 'manufactured' product, but falls under the meaning of the 'agricultural' exemption. 52 M.C.C. 511, 531."

A number of decisions have dealt with the "exempt" or "non-exempt" status, under former §203(b)(6), of commodities which, like orange juice, are created by nature within a protective covering, shell, or husk.

In *Erickson Transport Corp. Extension—Madison, So. Dak.*, 78 M.C.C. 707 (1957), the Commission itself held that fresh liquid eggs, egg yolks, and egg albumin, removed from the shell, were non-manufactured and "exempt" under former §203(b)(6).

In *Frozen Foods Express v. U. S.*, 148 F. Supp. 399, affirmed 355 U.S. 6, the Court held that dried egg powder, dried egg yolks, and ground shell peanuts, among other commodities, were "exempt" and not manufactured commodities, yet each of these commodities was first removed from an outer protective shell and then subjected to far more severe processing than in the case of citrus juices.

The Commission, in the present case, held that citrus juices were "non-exempt" prior to the Act of 1958, and based its decision upon its prior decision in *Watkins Motor Lines, Inc.—Interpretation*, 64 M.C.C. 455 (1955), in which it held citrus juices to be manufactured commodities. At 64 M.C.C. at 459, the Commission stated:

> "That the extracting of juice from an orange creates a new form cannot be gainsaid. Instead of a fruit, we have a potable liquid. The orange enters the extractor as an agricultural commodity and emerging therefrom are skins, seeds, pulp, and, in our opinion, a manufactured product of the orange, namely, orange juice."

The *Watkins* decision is premised, falsely, upon the idea that extraction is a creative process. The Commission's own *Erickson* decision, supra, and *Frozen Foods Express v. U. S.*, supra, sufficiently demonstrate the error of this reasoning. The *Watkins* case cannot be reconciled with *East Texas Motor Freight Lines v. Frozen Foods Express*, supra.

It is, therefore, apparent that citrus juices were "exempt" under former §203(b)(6) as interpreted by this Court prior to the Act of 1958.

It should be noted that §7(a) of the Act of 1958 cannot have the retroactive effect of making citrus juices "not exempt" prior to its enactment. In deciding this particular question the Supreme Court must interpret the law as it was *before* the enactment of §7(a).

The Court will note that this case involves a complicated interplay of several controversial statutes, each with a considerable legislative history. This jurisdictional statement, however, does not permit a complete analysis and argument. This case is of considerable importance both to the appellant and to the Commission since it will determine whether the Commission has been properly administering the "grandfather" clause of §7(c) of the Act of 1958. It is submitted that both the Commission and the lower court have erroneously interpreted the Federal statutes here involved and, that, for the reasons given, the questions involved are substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Perry R. Moore, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 16 day of May, 1961, I served copies of the foregoing document on the several parties hereto, as follows:

1. On the United States, by mailing copies thereof in duly addressed envelopes, with mailing postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., Robert A. Bicks, Assistant Attorney General, Department of Justice, Washington 25, D.C., and John H. D. Wigger, attorney, Department of Justice, Washington 25, D.C., and by mailing a copy thereof in a duly addressed envelope postage prepaid to Miles Lord, United States Attorney, Federal Courts Building, St. Paul, Minnesota.
2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, with airmail postage prepaid, to Robert W. Ginnane, General Counsel, and Fritz R. Kahn, attorney, Interstate Commerce Commission, Washington 25, D.C.
3. On the intervenors, by mailing a copy thereof, in a duly addressed envelope, with airmail postage prepaid, to Frank B. Hand, Esq., and Daniel B. Johnson, Esq., Transportation Building, Washington 6, D.C.

/s/ Perry R. Moore

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-60-Civ-82

MILK TRANSPORT, INC.,

Plaintiff,

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Defendants,

and

ALTERMAN TRANSPORT LINES, INC., and
REFRIGERATED TRANSPORT CO., INC.,

Intervening Defendants.

MEMORANDUM & ORDER

Mr. Clay R. Moore and Mr. Donald A. Morken, Minneapolis, Minnesota, attorneys for plaintiff.

Mr. Robert W. Ginnane, General Counsel, and Mr. Fritz R. Kahn, attorney, Washington, D. C., attorneys for Interstate Commerce Commission.

Mr. Robert A. Bicks, Assistant Attorney General, Mr. John H. D. Wigger, Attorney, Washington, D. C., and Mr. Fallon Kelly, United States Attorney, St. Paul, Minnesota, attorneys for United States of America.

Mr. Frank B. Hand, Jr., and Mr. Daniel B. Johnson, Washington, D. C., attorneys for intervening defendants.

Before Sanborn, Circuit Judge, Nordbye and Devitt, District Judges.

This is an appeal from an order of the Interstate Commerce Commission dismissing plaintiff's applications for certificates to transport citrus juices, in bulk, in tank vehicles, under the "grandfather" and "interim" clauses of the Transportation Act of 1958. Plaintiff asks this statutory three-Judge Court, 28 U.S.C. 2325, to set aside the order and enjoin the Commission by mandatory injunction to hear and determine plaintiff's applications.

This controversy stems from plaintiff's submission of Section 7(c), 72 Stat. 573, "grandfather" and "interim" applications to the Interstate Commerce Commission seeking authority to transport citrus juices in tank vehicles from points in Florida and Texas to points in several northern states. The applications were dismissed by an order dated September 4, 1959, without a hearing. Plaintiff's petition for reconsideration was denied by the Commission on December 22, 1959.

The broad issue is whether an interstate commerce motor carrier in bona fide transportation of citrus juices prior to the 1958 Transportation Act has an absolute right, under the "grandfather" clause of that Act, to continue transporting citrus juices without obtaining a Certificate of Public Convenience and Necessity from the Commission.

A short explanation of the issue in the light of the undisputed facts may be helpful.

The Interstate Commerce Act provides in Part II, 49 U.S.C. 301-328, for comprehensive regulation of motor carriers operating in interstate commerce. Basic to the Act is the prohibition contained in Sections 206 and 207 (49 U.S.C. 306, 307), against motor carriers operating in interstate commerce without holding a Certificate of Public Convenience and Necessity. This certificate requirement is waived in the situations set forth in Section 203(b), (49 U.S.C. 303(b)). The exemption involved in this controversy relates to agricultural commodities and as pertinent reads as follows:

> "Sec. 203
>
> "(b) Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include
>
> • • •

"(6) Motor vehicles used in carrying property consisting of * * * agricultural (including horticultural) commodities (not including manufactured products thereof), * * *"

Much litigation developed over the years as to whether certain products were agricultural commodities and hence "exempt" from the certificate requirement or were "manufactured products thereof" and thus "non exempt" from the requirement. The principal question involved the determination of how much processing could be done to an agricultural commodity before it changed to a "manufactured product thereof."

Section 7(a) of the 1958 Transportation Act amended Section 203(b)(6), (49 U.S.C. 303(b)(6)), and made more specific the provisions concerning the "exempt" or "non exempt" status of many commodities. The pertinent parts of the amended section are contained in the footnote.[1] Citrus juices are listed as "non exempt" in Commission Ruling 107 incorporated in the amended section. They have therefore been "non exempt" commodities since the 1958 Act became law. Consequently, a motor carrier operator who now desires to transport citrus juices in interstate commerce is required to have a Certificate of Public Convenience and Necessity from the Commission unless the carrier can prove that it was in bona fide transportation of citrus juices prior to the

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[1] "(b) Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * *

"(6) motor vehicles used in carrying property consisting of ordinary livestock, * * *, or agricultural (including horticultural) commodities (not including manufactured products thereof), * * *

"*Provided*, That the words 'property consisting of ordinary livestock, * * *, or agricultural (including horticultural) commodities (not including manufactured products thereof)' as used herein shall include property shown as 'Exempt' in the 'Commodity List' incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as 'Not Exempt'; *Provided further, however*, That notwithstanding the preceding proviso the words 'property consisting of ordinary livestock, * * * or agricultural (including horticultural) commodities (not including manufactured products thereof)' shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool-tops and noils, or wool waste (carded, spun, woven, or knitted. * * *"

1958 Act and that it has a right to continue transporting citrus juices by virtue of the "grandfather" clause enacted in Section 7(c) of the 1958 Transportation Act. The pertinent provisions of that section read as follows:

> "* * * if any person * * * was in bona fide operation on May 1, 1958, * * * in the transportation of property for compensation by motor vehicle *made subject to* the provisions of Part II of that Act by paragraph (a) of this section, * * * the Interstate Commerce Commission shall without further proceedings issue a certificate or permit. * * *" [Emphasis supplied.]

It is undisputed that plaintiff was a bona fide transporter of citrus juices prior to 1958. All parties agree that a basic requirement of the right to continue hauling a particular commodity under the "grandfather" clause is that the commodity must have been "exempt" prior to the 1958 Act and was made "non exempt" by the Act.

Plaintiff contends since there's no dispute that it was a bona fide hauler of citrus juices prior to 1958, the only issue for this court is whether citrus juices were "exempt" commodities prior to the 1958 Transportation Act amendment of Section 203(b)(6). If citrus juices were exempt, plaintiff claims the Commission must under the "grandfather" clause issue plaintiff a certificate without proof of public convenience and necessity. Plaintiff argues that even though the Commission had held citrus juices to be "non exempt" prior to 1958 in *Watkins Motor Lines, Inc., Interpretation*, 64 M.C.C. 455 (Div. 1, 1955), later U. S. Supreme Court and Federal District Court cases, see *East Texas Motor Freight Lines v. Frozen Food Express*, 351 U.S. 49 (1956), *Frozen Foods Express v. United States*, 148 F. Supp. 399, aff. 355 U.S. 6 (1957), *I.C.C. v. Koblin*, 113 F. Supp. 599 (1953), make it clear that citrus juices would have been declared "exempt" had an appropriate controversy reached the courts.

The defendants contend the issue of whether citrus juices were "exempt" prior to 1958 is not relevant to this proceeding. They argue that "grandfather" rights were conferred only on the eleven commodities[2] specifically listed in Section

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[2]"Frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted)."

7(a) as now being "non exempt." Defendants argue that the wording of Section 7(c) plus the Congressional intent as evidenced by committee reports indicates that only the eleven commodities listed were "made subject to" the certificate requirement of Part II of the Act, and consequently "grandfather" rights were given only to carriers of those specific commodities. Since citrus juices were not included in the commodities specifically listed in Section 7(a), they submit the question of whether citrus juices were "exempt" prior to 1958 is irrelevant.

We agree with the defendants that the first issue to be met is whether citrus juices were covered by the "grandfather" clause. If citrus juices were not included, we need not determine whether they were "exempt" prior to 1958.

It is axiomatic that Congress could include or exclude any commodities from the benefit of the "grandfather" clause. Congress could have refused to include any "grandfather" benefits in the 1958 Act. Consequently, assuming that a particular commodity had been specifically held "exempt" prior to 1958 and then declared "non exempt" by the 1958 Act, Congress could have excluded this particular commodity from "grandfather" rights while giving the benefit to other commodities. We must therefore look to the statute to determine whether citrus juices were accorded "grandfather" rights.

The essential provisions of Sections 7(c) and 7(a) have been previously quoted in this memorandum. The primary question in resolving this dispute is the determination of what the words "made subject to" mean in the context of the statute. Plaintiff contends the phrase means that all commodities in Section 7(a), including those in Ruling 107 in the first proviso are subjected to the requirements of Part II of the Act. Defendants argue that the only items "made subject to" Part II are the eleven specified commodities in the second proviso. No determination as to the status of several of these commodities had ever been made, but Ruling 107 listed most of the eleven items as having been found "exempt" by the courts or the Commission, and defendants contend that these items were being brought back under regulation by Section 7(a). They argue that Congress gave

"grandfather" rights only to carriers which had been legitimately hauling these eleven commodities.

We agree with the defendants' interpretation of Section 7(c). Congress did not have to make the items in Ruling 107 subject to the Act, with the exception of the eleven commodities which had either been declared "exempt" or on which no ruling had been made. It is perhaps true, as plaintiff argues, that Congress would have specifically afforded "grandfather" rights to citrus juices had they been declared "exempt" in any appropriate controversy which reached the courts. Remembering, however, that Congress could limit "grandfather" benefits as it chose, it matters only that Congress gave its approval to the Commission's characterization of citrus juices as "non exempt" commodities. Citrus juices had been held "non exempt" prior to 1958 by the Commission, *Watkins Motor Lines, Inc., Interpretation*, 64 M.C.C. 455 (Div. 1, 1955), and Congress was providing "grandfather" rights only for carriers of those eleven commodities which had been "exempt" and were being specifically made "non exempt."

Where the terms of a statute are not clear, we may look to the legislative history in an attempt to determine the intent of Congress. *United States v. UAW-CIO*, 352 U.S. 567 (1957); *Woods v. Western Holding Corp.*, 173 F.2d 655, 659 (8th Cir. 1949). The committee reports clearly indicate Congressional intent in the enactment of the "grandfather" clause. The report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1922, 85th Cong. 2d Sess. 17 (1958), reads in part as follows:

> "This amendment would halt further expansion of the scope of the exemption, and it would return to economic regulation the transportation of frozen fruits, frozen berries, frozen vegetables, coffee, tea, cocoa, hemp, imported wool and certain categories of domestic wool. • • •
>
> "Any person engaged on June 1, 1958, in trucking *the aforementioned commodities* which are returned to regulation by this amendment would be entitled upon application to a certificate or permit • • •." [Emphasis supplied.]

The conference report, H.R. Rep. No. 2274, 85th Cong., 2d Sess. 15 (1958), indicates further Congressional intent to

provide "grandfather" benefits only for the mentioned commodities as follows:

> "Under the conference agreement the agricultural commodities exemption is frozen in accordance with ruling 107, referred to above, with the following modification, which is a compromise between the Senate and House provisions: Returned to economic regulation is the transportation by motor vehicle of frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, hemp, wool imported from any foreign country, wool tops and noils and wool waste which has been carded, spun, woven, or knitted. * * *
>
> "Under the House amendment any person engaged on June 1, 1958, in trucking the *aforementioned commodities* which are returned to economic regulation by this amendment would be entitled, upon application to a certificate or permit allowing him, under regulation, to continue the transportation of the same commodities within the same areas or between the same points. The Senate bill used the date January 1, 1958. The conference agreement uses the date May 1, 1958." [Emphasis supplied.]

It is clear from this language that Congress intended only the eleven specified commodities, and not including citrus juices, to have "grandfather" benefits.

Plaintiff also argues that the Commission itself, *Inland Motor Freight "Grandfather" Application;* No. MC59077 (Sub. No. 33), 14 Fed. Carr. Cas., Para. 35,004 (C.C.H.) (Div. 1, Oct. 1960), determined that the words "made subject to" should not be read in a restrictive sense. That decision relates solely to the situation where an otherwise "exempt" commodity loses its exemption when hauled with a "non exempt" commodity in the same vehicle at the same time. The *Inland* case is not applicable to this controversy.

Plaintiff lastly contends that the scope of review is limited to a consideration of the grounds set forth in the Commission's order for its decision. Plaintiff argues that the Com-

mission order of September 4, 1959,[3] dismissed plaintiff's applications solely for the reason that citrus juices were not "exempt" commodities prior to the 1958 Transportation Act. Consequently, plaintiff submits that, under the holding in the *Chenery* cases, *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943), and *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947), this court cannot uphold the Commission on grounds other than those specified in the order

In the first *Chenery* case, 318 U.S. 80 (1943), the Supreme Court reviewed an order of the Securities and Exchange Commission which refused to allow preferred stock acquired by management officials during a reorganization period to participate in the reorganization on an equal footing with all other preferred stock. The corporation involved was registered under the public Utility Holding Company Act and the Commission had to determine whether the terms of the new stock issuance were "fair and equitable" or "detrimental to the interest of investors" within the meaning of the Act. The Commission based its order on principles of equity as announced by the courts, but the Supreme Court held that the authorities cited were not sufficient to sustain the order and the case was remanded to the Commission.

The first *Chenery* case did hold that a reviewing court must judge an agency order only on the grounds on which the order was based, but the court limited this rule to determinations which the administrative agency alone is authorized to make. The court, 318 U.S. 80, 88, used these words:

> "In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that,

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[3] "• • • It further appearing, That in Watkins Motor Lines, Inc., Interpretation of Certificates, 64 M.C.C. 455, it was found that the term 'agricultural commodities (not including manufactured products thereof)' as used in Section 203(b)(6) of the Interstate Commerce Act does not include citrus juices;

And it further appearing, That as citrus juices, in bulk, in tank vehicles, was not included in the term 'agricultural (including horticultural) commodities (not including manufactured products thereof),' as used in Section 203 (b)(6) of the Interstate Commerce Act prior to the Transportation Act of 1958;

It is ordered, That the applications • • • be, and they are hereby, dismissed • • •"

in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' Helvering v. Gowan, 302 U.S. 238, 245. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative Agency."

We are not concerned here with a judgment which only the Interstate Commerce Commission can make. The expertness of the Commission does not make it better qualified than this court to interpret the phrase "made subject to" involved in this action. The interpretation here is wholly different from what it is in the case where Congress specifically entrusts an administrative agency, because of its special competence, with the task of defining or interpreting general words[4] or setting up standards or rules of conduct. We are interpreting the scope of a federal statute and this task is not peculiar to an administrative agency.

Having decided that the transportation of citrus juices was not afforded "grandfather" rights under Section 7(c) of the 1958 Transportation Act, we need not determine whether

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[4]Such as the words involved in the *Chenery* case—"fair and equitable" or "detrimental to the interests of investors."

citrus juices were "exempt" commodities prior to 1958.

Plaintiff's complaint is dismissed.

Dated: December ..., 1960.

/s/ John B. Sanborn,
Circuit Judge

/s/ Gunnar H. Nordbye,
District Judge

/s/ Edward J. Devitt,
District Judge

APPENDIX B

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 4th day of September, A.D. 1959.

NO. MC-113255 (Sub-No. 8)

MILK TRANSPORT, INC.
"GRANDFATHER" APPLICATION

(NO. MC-113255 (Sub-No. 9)

MILK TRANSPORT, INC.
"INTERIM" APPLICATION

It appearing, That in No. MC-113255 (Sub-No. 8), Milk Transport, Inc., seeks, among other things, a certificate, under the "grandfather" clause of Section 7(c) of the Transportation Act of 1958, to transport citrus juices, in bulk, in tank vehicles;

It further appearing, That in No. MC-113255 (Sub-No. 9), Milk Transport, Inc., seeks, among other things, a certificate of public convenience and necessity to transport citrus juices, in bulk, in tank vehicles, under the so-called "interim" provisions of Section 7(c) of the Transportation Act of 1958;

It further appearing, That applicant's position is that citrus juices, in bulk, in tank vehicles, were exempt commodities under Section 203(b)(6) of the Interstate Commerce Act prior to its amendment by the Transportation Act of 1958, and that it was in bona fide transportation of the commodity on and prior to May 1, 1958, from and to some points, and prior to August 12, 1958, from and to other points, and that it is entitled to "grandfather" and "interim" rights under Section 7(c) of the Transportation Act of 1958;

It further appearing, That in Watkins Motor Lines, Inc., Interpretation of Certificates, 64 M.C.C. 455, it was found

that the term "agricultural commodities (not including manufactured products thereof)" as used in Section 203(b)(6) of the Interstate Commerce Act, does not include citrus juices;

And it further appearing, That as citrus juices, in bulk, in tank vehicles, was not included in the term "agricultural (including horticultural) commodities (not including manufactured products thereof)," as used in Section 203(b)(6) of the Interstate Commerce Act prior to the Transportation Act of 1958:

It is ordered, That the applications in Nos. MC-113255 (Sub-No. 8) and MC-113255 (Sub-No. 9), be, and they are hereby, dismissed insofar as authority is sought therein under Section 7(c) of the Transportation Act of 1958 to transport citrus juices, in bulk, in tank vehicles.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX C

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 22nd day of December, A.D. 1959.

No. MC-113255 (Sub-No. 8)

MILK TRANSPORT, INC.,
"GRANDFATHER" APPLICATION
(New Brighton, Minn.)

No. MC-113255 (Sub-No. 9)

MILK TRANSPORT, INC.,
"INTERIM" APPLICATION

Upon consideration of the record in the above-entitled preceding, and of:

(1) Petition of applicant, filed October 19, 1959, for reconsideration of the order dated September 4, 1959, by the Commission, division 1, dismissing the applications in Nos. 113255 (Sub-No. 8) and MC-113255 (Sub-No. 9) insofar as authority is sought therein under section 7(c) of the Transportation Act of 1958, to transport citrus juices, in bulk, in tank vehicles;

(2) Reply by Class I Rail Carriers in Western District, Protestants, filed October 29, 1959;

and good cause appearing therefor:

It is ordered, That the said petition be, and it is hereby, denied, for the reasons (1) that the said order of September 4, 1959, was entered in accordance with the law after it appeared that the authority applicant seeks to transport citrus juices, in bulk, in tank vehicles, properly may not be made the subject of an application for authority under section 7(c) of the Transportation Act of 1958, and (2) that no sufficient cause appears for vacating the order of September 4, 1959,

or for further considering the portions of the applications dismissed by that order.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX D

Section 203(b)(6), Part II, Interstate Commerce Act, as amended by Section 7(a) of the Transportation Act of 1958

"(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * *. (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shellfish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: *Provided*, That the words 'property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)' as used herein shall include property shown as 'Exempt' in the 'Commodity List' incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as 'Not exempt': *Provided further, however*, That notwithstanding the preceding proviso the words 'property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)' shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products); * * *."

APPENDIX E

7(c), Transportation Act of 1958

"(c) Subject to the provisions of section 210 of the Interstate Commerce Act, if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that Act by paragraph (a) of this section, in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to the said Commission as provided in part II of the Interstate Commerce Act and within one hundred and twenty days after the date on which this section takes effect. Pending the determination of any such application, the continuance of such operation without a certificate or permit shall be lawful. Any carrier which on the date this section takes effect is engaged in any operation of the character specified in the foregoing provisions of this paragraph, but was not engaged in such operation on May 1, 1958, may under such regulations as the Interstate Commerce Commission shall prescribe, if application for a certificate or permit is made to the said Commission within one hundred and twenty days after the date on which this section takes effect, continue such operation without a certificate or permit pending the determination of such application in accordance with the provisions of part II of the Interstate Commerce Act."